

In the Matter of License No. 19846

Issued to: JOHN VENTOLA

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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JOHN VENTOLA

This appeal comes before me in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.11-1.

On 20 and 27 July, 1949, Appellant appeared before an Examiner of the United States Coast Guard at New York City to answer a charge of "misconduct" supported by a specification alleging that while Appellant was serving as First Assistant Engineer on board the American SS MINUTE MAN, under authority of License No. 19846, he did, on or about 15 December, 1948, assault and batter the Master of said vessel, one Albert G. Hokins, who was then and there in the performance of his official duties.

At the hearing, Appellant was duly informed as to the nature of the proceeding, the rights to which he was entitled and the possible outcomes of the hearing. Appellant was represented by counsel of his own choice and he entered a plea of "not guilty" to the specification. The Investigating Officer then made his opening statement and Appellant's counsel waived his right to submit an opening statement for the person charged.

The Investigating Officer rested his case after the testimony of two witnesses had been introduced in evidence. These two men were Albert G. Hokins and William R. Stuard, the Master and Purser, respectively, of the SS MINUTE MAN at the time of the alleged assault and battery.

The Master testified, in essence, that Appellant had attacked him without provocation. The Purser, who was present at the scene of the altercation, stated that he did not know which of the two men had struck the first blow but the Master appeared to be on the defensive. There are discrepancies between the testimony of the Master and that of the Purser as to whether:

1. Appellant and the Master exchanged blows or the Master was the only person hit.
2. There was any conversation between Appellant and the Master before the fight started.
3. The Master got up and went around the table or was attacked while sitting on the settee behind the table.

Appellant was the only witness to testify in his own behalf. He stated that he had hit the Master only after the latter had hit him with a clip board.

After the Investigating Officer had rested his case and again at the conclusion of Appellant's testimony, counsel made a motion to dismiss the charge and specification on the grounds that the Investigating Officer had not made out a prima facie case because of the contradictory nature of the testimony of the latter's two witnesses and Appellant was not serving as First Assistant Engineer under authority of his license, at the time of the alleged offense, since he had been discharged just before the incident occurred. The Examiner denied the motion on both grounds.

After both parties had completed their closing arguments and had been afforded an opportunity to submit proposed findings and conclusions, the Examiner found the charge and specification "proved." On the basis of his findings and conclusions, the Examiner entered an order suspending Appellant's License No. 19846, and all other valid licenses, certificates and documents issued to him by the Coast Guard, for a period of eight months. The first four months suspension was made effective immediately and the remaining four months was suspended subject to a probationary period of eight months from 27 November, 1949.

Appellant's memorandum on the motion to dismiss and his appeal are based on substantially the same contentions:

- Point 1. The findings are unsupported by the evidence since they were not proved by substantial evidence.
- Point 2. The findings and the opinion of the Examiner are incorrect in law. The charge and specification should have been dismissed for lack of jurisdiction since Appellant was not serving as First Assistant Engineer, or in any other capacity, under authority of his license at the time of the alleged assault and battery.
- Point 3: The order of four months outright suspension and four months probationary suspension is oppressive when the facts and circumstances surrounding the case are examined.

There is no record of any prior disciplinary action having been taken against Appellant by the United States Coast Guard. He graduated from the Merchant Marine Academy in 1944 and has been going to sea on American ships since that time. Appellant is twenty-eight years of age.

FINDING OF FACT

On or about 15 December, 1948, Appellant was serving as a member of the crew in the capacity of First Assistant Engineer on board the American SS MINUTE MAN, under authority of License No. 19846, while the ship was in the port of New York City after the completion of a coastwise voyage.

On this date at approximately 1500, Appellant was summoned to the Master's office to be paid off for the voyage just completed. When Appellant entered the office of Hokins, the Master, Hokins and the Purser were seated behind a small table approximately three feet square. They were sitting on a settee which was on the opposite side of the room from the entrance to the room. Appellant stood by the side of the table which was perpendicular to the settee and nearer to the Purser than the Master. The Master gave Appellant his pay voucher, the latter signed it, received his wages for the trip, and the Master handed him his Certificate of Discharge. The testimony is not clear as to whether there was any conversation between the Master and Appellant during the time of the above transaction.

Almost immediately after Appellant had signed off the articles, he spit in the Master's face and struck him by leaning across the table. The Master picked up a fibre clip board which had been on the table and used it to ward off the Appellant. The exact sequence of events beyond this point is slightly confused. The Purser testified that the Master walked around the table in front of Appellant after asking the Appellant to leave the room, but that he (the Purser) was busy picking up money which had been knocked to the floor and, consequently, he did not see who struck the first blow. He did state that there was an exchange of blows between the two men and that the Master was definitely on the defensive. The Master testified that Appellant continued the attack by either coming over the table or around the table to get nearer to him and that he (the Master) did not hit Appellant a single time. At any rate, there was a fight and the Master was either knocked down or tripped and fell while retreating. The Appellant continued to batter him until the Purser pulled him away from the Master. Appellant then left the room. He had been badly cut on the wrist by the clip board and the Master received a broken finger, a black eye, a cut lip and bruises on the face and chest.

Appellant retired to his quarters to secure the remainder of his belongings. Upon leaving the ship, he was taken into custody by the police and returned to the presence of the Master. The latter at first said that he thought Appellant had attempted to steal the payroll money in the cash box on the table. But after counting the money and finding it all there, he charged Appellant with assault and battery. On the basis of the latter charges, criminal prosecution was instituted against Appellant. He had been released on bail at the time of the hearing.

It appears from the record that the primary reason Appellant was being paid off by the Master was due to a personal dislike that each bore for the other. They had been sailing together on the same ship for more than a year but the Master testified that he had as little contact as possible with Appellant. The latter's replacement had been on board the ship since the morning of the day on which the incident took place.

OPINION

Appellant contends in his appeal (Point 2) that the Coast Guard has no jurisdiction, under Title 46 United States Code 239, to conduct a hearing based on the charge arising from an incident which occurred after Appellant had signed off the articles for the voyage completed by the American SS MINUTE MAN on 15 December, 1948. Appellant states that since he had signed off the articles, he was no longer serving as First Assistant Engineer on board a merchant marine vessel of the United States under authority of his duly issued License.

Title 46 United States Code 239(b) requires that the person charged must be "acting under the authority of his license or certificate of service". It does not specify that jurisdiction attaches only when a man is under articles for a voyage. Consequently, although it is usually true that the person charged is proven to have been acting under the authority of his license as a corollary of being under articles for a voyage, it is not necessarily true that a person must be under articles in order to be acting under the authority of his license. It is the position of the Coast Guard that the paramount factor in determining whether a person is serving under authority of a license or certificate is that of the employment status.

Appellant attacks the Coast Guard's jurisdiction in this case on the theory that it is analogous to the extent of the protection afforded to seamen under the Jones Act. In support of this position, Appellant's memorandum on his motion to dismiss the charge and specification cites two cases wherein recovery was sought by injured seamen. The Examiner in his decision, has ably distinguished both of these cases from the present one. The fundamental reason why neither of these cases represent an accurate analogy is that the seamen were never under articles in either one of these cases.

Appellant argues that the courts have held that a seaman may not recover under the Jones Act when he is not under articles. IN Pryce's Case, 1939 A.M.C. 1180, which is one of the cases cited by Appellant, it was said that a certain seaman who was not under articles was not a member of the crew. But it did not say that the claimant was not a seaman and the requirement of the Jones Act, with respect to who may recover, is that the person must be a "seaman". The term "seaman" is broad enough to cover not only one who is a member of a crew but also one who is not a member of a crew. Carumbo v. Cape Cod SS Co. (C.C.A. Mass. 1941), 123 F. 2d 991. And in Wong Bar v. Suburban Petroleum Transport, Inc. (C.C.A. N.Y. 1941), 119 F.2d 745, it was held that an employee who was never under articles could recover under the Jones Act for injuries received while leaving the tugboat on which he was employed. The latter case in particular negatives Appellant's argument that no recovery can be had under the Jones Act by one who is not under articles.

It can be shown by an analogy of recovery under the "maintenance and cure" theory, recovery under the Jones Act and the question of Coast Guard jurisdiction, that the Coast Guard Examiner properly assumed jurisdiction in this case.

Whether Appellant was "acting under authority of his license" depends upon whether he was

still "in the service of the Ship". With respect to the seamen's right to recover for maintenance and cure while on shore leave, the case of Aguilar v. Standard Oil Company of New Jersey (1943), 318 U. S. 724, states that seamen are "on the shipowner's business" when on shore leave and therefore they can recover barring misconduct on the part of the seaman. It is generally agreed that seamen can recover maintenance and cure if they are "in the service of the ship" at the time of their illness or injury. Therefore, the court held that seamen on shore leave are "in the service of the ship," as well as "on the shipowner's business", while on shore leave.

The Coast Guard has followed the Aguilar decision to the logical conclusion that a seaman on shore leave may be guilty of "misconduct" within the jurisdiction of the Coast Guard because the seaman is "acting under authority of his license" when he is "in the service of the ship" if the latter status is dependent upon the seaman's possession of a license issued by the Coast Guard. This position has been taken in Headquarters appeals including Nos. 315 and 361 in which the reasons for this have been fully set out.

A subsequent case recognized, and took advantage of, the similarity between the requisites for recovery of maintenance and cure as set out in the Aguilar case and recovery for injuries under the Jones Act. Nowery v. Smith (D.C. Pa. 1946), 69 F. Supp. 755, affirmed 161 F. 2d 732. It was said that a seaman could recover for injuries received as a result of an unprovoked attack, while he was on shore leave, because the seaman was "in the course of his employment" within the meaning of the Jones Act. Referring to the Aguilar case, the Court used the following words:

"And if, for the purpose of determining the shipowner's liability for maintenance and cure, the seaman is said to be on 'the shipowner's business' while on shore leave, I can see no valid reason why, for the purpose of determining the shipowner's liability under the Jones Act, the seaman should not be said to be 'in the course of his employment' at the same time. It is simply a question of defining the seaman's status; and I think that the concepts 'on the shipowner's business' and 'in the course of employment' as they are applied to the seafaring trade, comprehend identical factual situations. * * * * the plaintiff in the instant case was on 'the shipowner's business', and 'in the course of his employment,' at the time when the fight occurred which resulted in his injuries."

And in the Wong Bar case, supra, it was concluded that a cook could recover under the Jones Act when he was injured leaving his employer's tugboat after receiving instructions that no work was required of him until repairs on the boat were completed. It was said that he was acting "in the course of his employment," and therefore a deckhand's negligence in assisting him to leave the boat were imputable to the shipowner so as to render the latter liable for injuries sustained by the cook as the result of the deckhand's negligence in assisting him.

Considering the above three cases together, we reach the logical conclusion that when a seaman is "in the course of his employment", he is also "in the service of the ship" for purposes of maintenance and cure recovery as well as for purposes of Coast Guard jurisdiction. The Coast Guard may assume jurisdiction when a seaman is "in the service of the ship" because he is then

acting "under authority of his license" if there is a causal relationship between the two. The Aguilar case draws the parallel between being "in the service of the ship" and "on the shipowner's business"; the Nowery case held that "on the shipowner's business" and "in the course of employment" are synonymous terms; and the Wong Bar case supports the position that a seaman is "in the course of his employment" under such circumstances as are present herein.

The similarity between the seaman's employment status in the Wong Bar case and Appellant's employment status is obvious. In the former case, the seaman had been discharged from all duties until some indefinite time in the future when his employer requested his services. Yet he was said to still be "in the course of his employment," or "in the service of his ship," while leaving the tugboat of his employer. Appellant was still aboard the vessel and had just signed off the articles when the incident in question took place. Consequently, Appellant was still "in the service of the ship", and "acting under authority of his license," since his employment status was the same as that of the seaman in the Wong Bar case. Although discharged from the articles of the ship, Appellant continued to act "under authority of his license" not because of the ship's articles, but because he was still considered to be "in the course of his employment", either within or without the meaning of the Jones Act. The act of signing off the articles does not mean that at that instant the seaman ceases to act "under authority of his license" any more than a seaman ceases to be "in the course of his employment" the moment he stops working and commences to leave the ship in situations when no articles are involved.

From this it can be seen that the analogy of the status of seamen seeking recovery under the Jones Act for injuries received after their work has been completed and the status of seamen (with regard to Coast Guard jurisdiction) who have just signed off the ship's articles is necessarily as accurate as the comparison of the relative position of seamen on shore leave who seek recovery for maintenance and cure and that of seamen on shore leave who commit acts of misconduct. This is true because the Nowery case bases the requisite Jones Act status on the maintenance and cure status as set out in the Aguilar case.

From the point of view that the Coast Guard has properly assumed jurisdiction when the circumstances are comparable to situations where seaman may recover maintenance and cure, the propriety of Coast Guard action in this case is even clearer. In The Michael Tracy (C.C.A. Va. 1924), 295 Fed. 680, it was held that the obligation of a ship to furnish maintenance and cure to an injured seaman extends to an injury received by a seaman after he has been paid off and formally discharged on board but before he has left the ship. I quote:

"* * * the obligation of the ship to furnish maintenance and cure attaches to accidents which happen in the brief interval between the time a seaman is paid off and formally discharged and the subsequent time at which, in ordinary course, he actually gets physically away from her."

This case, considered in the light of the Nowery case, would permit recovery under the Jones Act as well as for maintenance and cure, so far as the employment status is concerned. The basic employment status required (under the Jones Act; for maintenance and cure and for Coast Guard

jurisdiction), is that the seaman must be "in the service of the ship." Consequently, it would be absurd to say that, in the case of an unprovoked attack by one seaman on another immediately after they had both signed off the ship's articles and were still aboard the ship, the employment status requirements for both maintenance and cure and the Jones Act would be met but the man committing the assault and battery would not be subject to Coast Guard jurisdiction because he was not in the proper employment status. The fallacy of this reasoning completely overthrows Appellant's theory that Coast Guard jurisdiction does not attach in the case of acts of misconduct committed immediately after the seaman has signed off the ship's articles.

Appellant also points out that, in any event, he was definitely not "serving as first assistant engineer" at the time of the incident. What has been said above is adequate to dispose of this contention. Since Appellant's employment status continued beyond the time when he signed off the articles, it is only logical to conclude that all aspects of his employment status remained the same as before except that he no longer was serving in an active capacity.

Appellant also contends (Point 1) that there is no substantial evidence to support the findings of the Examiner, but he has failed to specify which findings he considers defective. The Examiner has included ten findings of fact in his decision. Some of them have been admitted by Appellant, others are not essential to the conclusion of "guilty", and the first finding has been discussed elsewhere in my opinion. The remaining findings, which are necessary to support the charge and specification, are findings No. 4, 5 and 10. Since the validity of findings No. 5 and 10 are dependent upon finding No. 4, it is assumed that Appellant's argument is directed against the latter finding which reads as follows:

"That almost simultaneously, although a second or two thereafter, the person charged spit in the Master's face and assaulted the Master with his fists."

With respect to this finding, Appellant testified that he did spit but that he had spit to the side in disgust. He also stated that he had hit the Master but only after the Master had struck him with the clip board; that he had hit the Master only three or four times; that the Master probably hit him once or twice with his bare hands; and that he believed the Master tripped and fell.

The Master testified that Appellant leaned over the table and spit in his face. Then the Master picked up the clip board to fend off any further spitting and Appellant lunged over the table and started to hit him with his fists. The Master stated that he did not hit Appellant at any time and that the Appellant continued the attack, after the Master had fallen down, until the purser pulled him away.

The purser testified that Appellant reached across him toward the Master and either made a noise or spit in the Master's face. The purser did not see what actually took place. Then the Master asked Appellant to leave and got up and walked around the table until he was in front of Appellant. Again, according to his testimony, the purser did not see what happened until he realized that the two men were exchanging blows. When the Master fell on the settee, Appellant continued to strike him until the purser separated the two men.

In this proceeding, it is necessary that the findings be supported by "reliable, probative, and substantial evidence." Substantial evidence has been defined as evidence which affords a substantial basis of fact from which the fact in issue can be reasonable inferred. National Labor Relations Board v. Columbian Enameling and Stamping Company, Inc., (1939), 306 U.S. 292. And it means that the one weighing the evidence takes into consideration all the facts presented to him and all reasonable inferences, deductions and conclusions to be drawn therefrom and, considering them in their entirety and relation to each other, arrives at a fixed conclusion. National Labor Relations Board v. Thompson Products, Inc. (1938), 97 F. 2d 13. It means more than a mere scintilla of evidence. Substantial evidence must possess something of substance and relevant consequence and not consist of vague, uncertain, or irrelevant matter, not having the quality of proof to induce conviction. It is such evidence that reasonable men may fairly differ as to whether it establishes the case, and, if all reasonable men conclude that it does not do so, then it is not substantial evidence. Jenkins and Reynolds Co. v. Alpena Portland Cement Co. (C.C.A. Mich. 1906), 147 Fed. 641.

The reliability of the evidence and its probative value must also be taken into consideration. This means that even substantial evidence must be carefully weighed and evaluated in the light of the credibility of the witnesses and the other common sense rules of probity and reliability which prevail in courts of law and equity. There are no real rules governing these two factors but there are certain standards and principles which people engaged in the conduct of responsible affairs instinctively understand and act upon.

The record indicates that the Examiner complied with these requirements and that there is substantial evidence on which to base the findings and conclusions arrived at by him. There are conflicts in the testimony of the three witnesses but there is certainly substantial basis for a reasonable man to draw the inference that Appellant spit on the Master and assaulted him. Considering the testimony in its entirety, it is conclusively established that Appellant did spit, there was a fight and the Master either tripped or was knocked down. The purser's testimony agrees substantially with that of the Master except for his claim of lack of knowledge as to whether Appellant spit on the Master and his failure to observe who struck the first blow. The Master gave positive testimony that Appellant did spit in his face and followed this with an unprovoked attack. It has been held that positive testimony is entitled to greater weight than negative testimony. Martug Towing Co. v. Eastern Transportation Co. (1945), 152 F. 2d 924. Hence, the Examiner was justified in making his finding No. 4 and the ultimate finding No. 10 that it was an unprovoked assault by the Appellant. There was substantial evidence to support this position.

The conclusions of the Examiner should not be set aside unless they are "clearly erroneous" because not supported by substantial evidence. Pullman Co. v. Chicago & N.W. R. Co. (C.C.A. Ill. 1940), 110 F. 2d 425. Having found that there is substantial evidence to support the charge and specification, it is my duty to uphold the decision of the Examiner on this ground of appeal. Knapp v. United States (C.C.A. Ill., 1940), 110 F. 2d 420.

Appellant's contention that the order is excessive under the circumstances (Point 3) has been adequately answered by the decision of the Examiner wherein it is stated that the prevailing circumstances were taken into consideration. Therefore, the order must be sustained on this ground

as well as the other two.

CONCLUSION AND ORDER

The Order of the Examiner dated 27 July, 1949, should be, and it is AFFIRMED.

J. F. FARLEY
Admiral, United States Coast Guard
Commandant

Dated at Washington, D. C., this 30th day of November, 1949